DOCUMENT RESUME

ED 254 110 HE 017 379

AUTHOR Hafen, Bruce C.
TITLE Testimony of Bruce C. Hafen before the Senate Judiciary Subcommittee on the Constitution, concerning S. 2568, "The Civil Rights Act of 1984."
PUB DATE 30 May 84
NOTE 65p.
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Viewpoints (120)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Church Related Colleges; *Civil Rights; *Compliance (Legal); Federal Aid; *Federal Legislation; *Federal Regulation; *Government School Relationship; Hearings; Higher Education; Institutional Autonomy; Position Papers; *Private Colleges
IDENTIFIERS Proposed Legislation; Title IX Education Amendments 1972

ABSTRACT

Testimony on S.2568, "The Civil Rights Act of 1984," is presented by the president of the American Association of Presidents of Independent Colleges and Universities. The legislation is designed to broaden the application of Title IX so that activities of the entire college would be subject to federal regulation. Institution-wide coverage would be created in situations where substantial federal aid is already flowing to some part of an institution, or where federal aid is provided to students. It is claimed that public perceptions that discrimination occurs at private colleges are mistaken. Ambiguities about the bill include: whether the legislation expansively broadens federal control over state and local governments and private activity; whether the bill expansively broadens the term "recipient" to include schools that enroll students receiving general welfare assistance; and whether religious schools and organizations are subject to federal jurisdiction. The costs of expanding compliance obligations across the entire campus and the yielding of educational independence by private colleges are cited as negative effects of the proposed legislation. Reasons against extensions of federal power are examined, along with suggestions for redrafting the bill. (SW)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED254110

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

✓ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Bruce C. Hafen

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Testimony of Bruce C. Hafen

President, Ricks College

and

President, American Association of Presidents

of Independent Colleges and Universities

Before the Senate Judiciary Subcommittee on the Constitution

Concerning S. 2568, "The Civil Rights Act of 1984."

May 30, 1984

HE017 379

TABLE OF CONTENTS

		Page
I.	Background	2
	A. Description of AAPICU	2
	B. AAPICU's Prior View of Title IX	3
	1. Did student aid make a college a "recipient" of federal aid?	3
	2. Program Specificity	4
	C. The Impossible Dilemma of S. 2568 for Independent Colleges	6
	1. Option A — Refuse Admission to Students Receiving Federal Aid	6
	2. Option B — Better Fed Than Dead	8
	D. Mistaken Assumptions About Discrimination on Private College Campuses	9
II.	Major Ambiguities in S. 2568	10
	A. Does S. 2568 Expansively Broaden Federal Control Over State Governments, Municipalities, and Private Activity?	11
	B. Does S. 2568 Expansively Broaden the Term "Recipient" to Include Schools Which Enroll Students Receiving General Welfare Assistance?	11
	C. Does S. 2568 Broadly Expand Agency Termination Power?	14
	D. Are Parochial Schools or Other Religious Organizations Subject to Federal Jurisdiction Under S. 2568?	16
	E. An Unconstitutional Establishment of Religion?	17
	F. Putting at Risk the Concepts of Tax Exemptions and Tax Credits?	20

Page

III. Particular Areas of Harm to Independent Colleges from Campus-Wide Coverage of Title IX 21

A. The Costs of Compliance 21

B. The Costs of Yielding Educational Independence 23

C. Special Concerns Under Title IX for the College with a Religious Mission 27

1. The General Problem 27

2. Illustrations of Specific Concerns 31

IV. Limitations on Federal Regulatory Power 34

A. Limitations on the Spending Power 34

B. The Spending Power, The First Amendment, and "Unconstitutional Conditions" 40

C. Federalism as a Limitation on Congressional Authority 42

V. Recommendations and Amendments 47

A. Redraft S. 2568 47

B. Broaden the Religious Exemption in Title IX 48

C. Amend the Definition of "Recipient" to Exclude Colleges Receiving No Direct Federal Assistance and Whose Students Receive No "Campus-Based" Benefits 49

Testimony of Bruce C. Hafen

President, Ricks College

and

President, American Association of Presidents

of Independent Colleges and Universities

Before the Senate Judiciary Subcommittee on the Constitution

Concerning S. 2568, "The Civil Rights Act of 1984."

May 30, 1984

Mr. Chairman and members of the Committee, I appreciate the opportunity of appearing before you. I am here primarily in my capacity as President of the American Association of Presidents of Independent Colleges and Universities (AAPICU). Additionally, I represent my own school, Ricks College, in Idaho, a private coeducational two-year college enrolling about 6,500 students. I am also interested in S. 2568 from my perspective as a Professor of Law at Brigham Young University. While I claim no special expertise in civil rights law, my publications in scholarly legal journals in the fields of family and constitutional law have been cited by the Supreme Court and by law school textbooks.

I. Background.

My perspective as a witness is centrally concerned with the effect of broadening the application of Title IX to private colleges receiving no direct federal financial grants. The main objective of S. 2568 is to create institution-wide coverage by several civil rights laws in situations where substantial federal aid is already flowing to some part of an institution or organization. I foresee some serious problems in the approach of the Bill to that general goal, and will mention some of those problems today. However, whatever else I may say, I hope my testimony helps you especially to see the severe problems the Bill would create for that tiny fraction of America's colleges and universities which have tried to remain financially independent of government.

A. Description of AAPICU.

AAPICU, organized in 1968, includes the presidents of some 165 private colleges and universities from 40 different states, with a total enrollment of about 330,000 students. 1/ Some of these are large universities, such as Baylor, Villanova, and Brigham Young. However, most are small colleges with enrollments under 2,500. Many of our schools are church-related, representing numerous denominations. All are deeply committed as a matter of conscience to the goals of non-discrimination and equal opportunity in higher education. (Parenthetically, we at Ricks College are very proud of the success of our women's track team, which a few days ago won second place in the National Junior College Athletic Association's national finals.) AAPICU is also committed to high standards of academic excellence. Several of our member schools were ranked among the nation's finest colleges — public or private — in the recently reported poll from U.S. college presidents in U.S. News & World Report. 2/

1/ A membership list is attached to my written statement.

2/ U.S. News & World Report, Nov. 28, 1983, p. 41. Berea College in Kentucky, Furman University in South Carolina, Pepperdine University in California, Whitworth College in Washington, William Jewell College in Missouri, Hillsdale College in Michigan, and Wheaton College in Illinois.

Virtually all of AAPICU's member schools have, until now, admitted students who receive federal financial assistance. However, about 60% of our schools receive no federal aid beyond what their students receive. Even among the other 40%, their direct federal aid represents but a slight fraction of their total operating revenues. 3/ In general, the member institutions of AAPICU are distinguished from other private colleges and universities by their determined efforts over many years to finance their own operations totally from the private sector. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. How ironic it is for these college presidents to realize today that, if S. 2568 is passed, they will be as completely overwhelmed by the collective cloak of regulation as if they had applied for the maximum possible federal assistance over all these years.

B. AAPICU's Prior View of Title IX.

Before the introduction of S. 2568 and before the Supreme Court handed down its decision in the Grove City case, AAPICU took the position that schools receiving no direct federal aid were not subject to campus-wide Title IX coverage. There were two bases for this view: first, that student aid alone did not make a college a "recipient" of federal aid and, second, that the "program specific" concept limited statutory coverage to the program or activity receiving the aid.

1. Did student aid make a college a "recipient" of federal aid?

The Title IX regulations took the position that an institution is a recipient when a student accepts financial aid, evidently on the theory that when an institution indirectly benefits

---

3/ Nearly half of the direct aid recipients in AAPICU report their non-student federal assistance is 1% or less of total revenues. About 90% of these recipients report that direct assistance is less than 8% of their revenues.

from aid to one of its patrons, the result is the same as with direct institutional aid. 4/ That theory contradicts some very important legal principles well established in other contexts, including those that allow tax exemptions to all charities and those that have allowed aid to parochial schools without amounting to an establishment of religion. 5/ It also contradicts the legislative history of Title VI, which the Supreme Court has said may be "crucial to an understanding of congressional intent in 1972 when Title IX was enacted . . . ." 6/ Nevertheless, the Education Department's position on the definition of "recipient" in Title IX was ultimately upheld as a matter of statutory interpretation by the Supreme Court in the Grove City case earlier this year. For reasons to be explained later in my testimony, this portion of the Grove City ruling needs to be corrected by congressional action. 7/

2. Program Specificity. The question of whether Title IX as originally enacted embodied coverage that was "program specific" or institution-wide has been the subject of much debate, including debate in these hearings. All but one of the court cases that considered the question upheld the program-specific interpretation after

---

4/ Title IX itself forbids sex discrimination under any "program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (emphasis added). The statute does not define "recipient" but the term is defined in the Department of Education's regulations, 34 C.F.R. § 106.2(h) (1983), to include educational institutions that "benefit" from assistance to others. The definition for "Federal financial assistance" is also only found in the regulations. 34 C.F.R. § 106.2(g) (1983).

5/ See text accompanying nn. 35-42, infra.

6/ Grove City College v. Bell, 104 S. Ct. 1211, 1228 (Brennan, J., dissenting).

7/ See text accompanying nn. 62-71, infra.

reviewing the statute and its legislative history. 8/ The most significant of these decisions is, of course, the Supreme Court's recent Grove City case. 9/

Yet the view has been vigorously expressed by some members of the current Congress that the House and Senate which enacted Title IX in 1972 obviously intended institution-wide rather than program-specific coverage. It is genuinely puzzling to an outsider that the intent of Congress and the meaning of a powerful new law on a matter of such fundamental importance could be so difficult to establish. The clearest lesson to be learned from this experience is that grave risks accompany the enactment of vague, symbolic laws passed without adequate deliberation on the assumption that somebody will attend later to the details. It is to be earnestly hoped that congressional action on S. 2568 will not be another illustration of that attitude. The current high interest in the subject presents a remarkable opportunity to review the nation's twelve-year experience with Title IX, so that our entire approach to the problem of sex discrimination in education can be updated, clarified, and focused in ways that accurately reflect the factual environment and the intent of Congress. The hasty generalizations reflected in the present approach to S. 2568 fall short of that goal.

8/ See, e.g., North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated, 52 U.S.L.W. 3700 (U.S. March 26, 1984) (in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984)); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (interpreting program specific requirement under section 504 of the Rehabilitation Act); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) (interpreting program specific requirement under Title VI). For another view of the judicial precedent, see 104 S. Ct. at 1230-1231 (Brennan, J., dissenting). The only case rejecting program specificity was Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982). See also, 117 Cong. Rec. 30155-30157, 30408 (1971) where Congress failed to adopt Senator Bayh's Title IX proposal which did not have a program specific limitation.

9/ 104 S. Ct. 1211 (1984).

C. The Impossible Dilemma of S. 2568 for Independent Colleges.

If S. 2568 should pass in its present form, eliminating the program-specific concept and leaving in place the Supreme Court's broad definition of "recipient," private colleges and universities receiving no direct federal assistance will be subject to campus-wide regulation if only one student on a federal grant should enroll. This situation presents these schools with an impossible choice. There are only two options, neither of which is desirable.

1. Option A — Refuse Admission to Students Receiving Federal Aid. Option A is that schools desiring to remain free of federal regulation must deny admission to any student who would, by being a recipient of a federal grant, make the school a legal "recipient" of federal aid. Colleges that take this position would probably face sharply reduced enrollments, because their students would have such obvious financial incentives to attend elsewhere, where federal funds would be available to them.

It is a tribute to the quality of the educational product offered by independent colleges that they have maintained their enrollments at all during recent years of rising prices and falling enrollments throughout higher education. But it is asking too much, realistically, to expect them to compete not only with the lower tuitions of state supported schools, but also with the federally funded student aid programs not available to their students. The independent schools could try to raise their own student funds, but their costs — because they bear them from private sources only — have already priced many of them out of the market. Private college tuitions average four to five times the amount of average public school tuitions. 10/ The impact of this competitive disadvantage is reflected in the report that the number of private sector colleges declined by about 11% in the nine years from 1969 to 1978: 120 closed outright, 40 merged with

---

10/ Education Commission of the States, Task Force on State Policy and Independent Higher Education (1977), p. 3.

other independents, and 16 merged with public institutions, for a total decline of 176 colleges. 11/

The attitude of private school supporters toward the idea of creating private grant funds to compete with federal grant funds will also reflect the frustration of being forced to pay four times for the college education of their children: once by supporting public colleges through paying state taxes, once by supporting federal student aid through paying federal taxes, again by paying expensive private college tuition, and still again by paying for private school student aid funds. At some point the camel's back will simply break. Some Option A schools will be brought to that point by lost tuition income, and will simply close their doors. It is not at all unrealistic, therefore, to suggest as a possible subtitle for S. 2568, "the Bill to terminate independent higher education."

Some may question whether any college or university would actually be so concerned about maintaining its independence from federal regulation that it would exercise Option A. Grove City College and Hillsdale College have already made public announcements that they will adopt this position. A recent telephone survey of a sample of AAPICU members asked the presidents of the schools that receive no direct federal aid what they intend to do if S. 2568 passes, making their entire campuses subject to complete regulation on the basis of student aid alone. Of the 58 colleges responding, while 28 indicated they would probably continue to accept students on federal assistance, 29 said they had not yet made a decision, and 1 indicated a definite decision not to accept such students.

One additional consequence of Option A is that it will force independent colleges to exclude, and thus discriminate against, students who need federal aid to obtain higher education. There is a particular irony here, since the students who are most in need of financial assistance due to their disadvantaged backgrounds tend to be

---

11/ The Chronicle of Higher Education, Dec. 18, 1978, pp. 7-8.

the same students Congress seeks to help by expanding the coverage of the civil rights laws. It can be reasonably argued that the student being thus helped should be free to take the conscious "risk" of attending an unregulated college, if that is the student's preference.

2. Option B — Better Fed Than Dead. Option B is to accept the full blown umbrella of federal regulations across the entire campus. This prospect would force some schools into an intolerable compromise with their very reasons for existing. 12/ But, some will say, "Better fed than dead."

Further reflection will suggest the foolishness of forcing the nation's last remaining vestige of truly independent higher education into the homogenizing mold of quasi-public schools. The chief educational contributions, as well as the continued survival, of independent colleges and universities are found primarily in their ability to offer unique educational alternatives to those seeking higher education. It is only by defining their educational missions on their own terms that these institutions have attracted both students and private sources of funding. Because Option B forces the loss of such distinctive contributions, American higher education will lose a major source of the initiative and innovation necessary to maintain true pluralism and diversity. Further, the independent schools will themselves thereby lose their primary competitive advantage.

Option B also portends serious economic consequences. For instance, the financial self-reliance of independent colleges has clearly made more public funding available to public sector schools, because the public schools have had less competition from private schools for government funding. That will no longer be true. Moreover, major contributors from the private sector will regret the loss of private education's distinctive character and hence lose interest in supporting it. And, of course, private colleges will themselves have far less incentive to seek help from private sources. It will

---

12/ The reasons why campus-wide coverage under Title IX has this effect are discussed in the text accompanying nn. 44-61, infra.

be all too easy to line up at the federal pay windows, since nothing will be gained by staying away. The aggregate reduction of private sector support for the staggering costs of national higher education under these circumstances should not be taken lightly.

D. Mistaken Assumptions About Discrimination on Private College Campuses.

It should be stressed that the occasion for your Committee's current deliberations is not that new evidence of discrimination or lack of actual commitment to civil rights has been found on American campuses, public or private. There was no allegation or charge of discrimination in Grove City. The HEW administrative law judge in the Grove City case stated that "there is not the slightest hint of any failure to comply with Title IX, save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief." 13/ Grove City College was guilty, not of discrimination, but of independence.

However, the public perception seems to be otherwise. In its story on the subject legislation on May 8, 1984, the Washington Post erroneously stated regarding the Grove City case, "The administration applauded the court decision, which barred a total aid cutoff to Grove City College in Pennsylvania under Title IX of the Education Act of 1972 after it was found that one of its programs discriminated against women." 14/ It should not be so difficult to believe that independent colleges really could oppose allowing the federal government to define the terms of their educational missions, yet at the same time take very seriously their privately held commitments to the goals of equal opportunity in education. 15/

In addition, S. 2568 almost seems to assume there are no other civil rights laws in place to protect the interests of non-discrimination in private colleges and

---

13/ Grove City College v. Bell, 104 S. Ct. at 1224 (1984).

14/ "Split Continues Over Rights Bill," Washington Post, May 8, 1984 (emphasis added).

15/ See text accompanying nn. 44-61, infra.

universities. However, all private institutions are subject to Title VII of the Civil Rights Act prohibiting discrimination in employment, and the Retirement and Age Discrimination Act of 1978, prohibiting age discrimination. Private colleges and universities are also subject to numerous other statutes affecting all employers. In addition, these institutions are subject to state civil rights laws and a variety of private legal remedies now arising to enforce nondiscrimination rights.

II. Major Ambiguities in S. 2568.

S. 2568 contains some surprisingly serious ambiguities which have two major effects. For one thing, a witness cannot be sure of either the actual or the intended impact of the legislation, making it very difficult to testify in a realistic way about its implications for independent higher education. The entire Bill is shot through with major uncertainties about its meaning, showing also a compelling need for a more deliberative approach to the legislative process than has been taken to date.

To its most ardent supporters, S. 2568 may look like a 90-yard touchdown pass. Closer inspection will reveal yellow flags all over the field.

This bill has been widely described as a minor amendment intended only to overturn the "program-specific" portion of the Supreme Court's ruling in the Grove City case. 16/ That is simply not true, as persuasively documented in the testimony of Assistant Attorney General Reynolds, who identified such sweeping problems as the Bill's limitless definition of "recipient," its substantial alteration of the entire approach to enforcement of most major civil rights laws, and the perplexing administrative problems it would create. 16a/

16/ Proponents of S. 2568 have given assurances that its "narrow purpose . . . is to eliminate the inappropriately restrictive interpretation imposed by the Grove City decision and reaffirm the legal safeguards available under these civil rights statutes." (130 Cong. Rec. S4585 (daily ed. April 12, 1984) (joint explanation by Senator Kennedy and Senator Packwood).) Senator Dole has stated that "[i]t is not the intent of the sponsors to break new ground." 130 Cong. Rec. S4590 (daily ed. April 12, 1984).

16a/ See n.18, infra.

There are additional substantive ambiguities affecting private education that cry out for clarification. Consider some examples.

A. Does S. 2568 Expansively Broaden Federal Control Over State Governments, Municipalities, and Private Activity?

AAPICU's interest is primarily in the application of S. 2568 to private education. For that reason, it is beyond the scope of this statement of testimony fully to explore the possible ramifications of the Bill for other portions of the private sector and for the complex system of federalism. However, since it has been recently observed that, "this legislation is barreling through Congress with essentially no opposition," 17/ I desire to register the strongest possible concern about the Bill's potential effects far beyond the realm of education. It is quite possible that issues relating to the appropriate extent of federal authority are more seriously raised by S. 2568 than are issues pertaining only to civil rights. 18/

B. Does S. 2568 Expansively Broaden the Term "Recipient" to Include Schools Which Enroll Students Receiving General Welfare Assistance?

While the expansive definition of "recipient" in S. 2568 reflects an understandable desire to eliminate all potential discrimination, the trouble with such limitless terms is that they become meaningless, as well as impossible to enforce realistically. Under this definition, would a social security beneficiary attending a private college cause the college to be a recipient of federal aid? What about a student who pays his tuition with earnings from a summer job on a federally funded highway construction project? These are not far-fetched questions, since in both cases the school is as much a

---

17/ Finn, "Civil Rights in Newspeak," Wall Street Journal, May 23, 1984. Professor Finn teaches at Vanderbilt University.

18/ For more detailed expressions of this concern, see id. See also the testimony of Assistant Attorney General, Wm. Bradford Reynolds on the subject legislation before the House of Representatives, May 22, 1984.

"transferee" of federal funds through an "entity or person" as is the case in explicit student aid programs.

Under present law (assuming S. 2568 is not enacted), "federal financial assistance" for purposes of Title IX is confined to assistance "extended under a law administered by the (Education) Department." 19/ Since welfare benefits are not administered by the Department of Education, the hypothetical cases mentioned would not trigger coverage by Title IX. In addition, the majority's analysis of the recipient question in Grove City clearly distinguished general-purpose welfare assistance from student aid by noting that "there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX" because "these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities." 20/

There is actually little practical difference in the "benefit" provided to a school between general assistance programs received by students (and spent to defray the cost of attending college) and student aid. However, the legislative background for Title IX also indicates that general welfare assistance would not trigger coverage of private institutions. "Title IX was patterned after Title VI of the Civil Rights Act of 1964," 21/ making the legislative history of Title VI "crucial to an understanding of congressional intent in 1972 when Title IX was enacted . . . ." 22/ Senator Humphrey, a chief sponsor of Title VI, stated:

> Perhaps the greatest amount of Federal assistance funds goes for direct programs, in which Federal funds are paid directly by the United States to the ultimate recipient, such as social security payments, veterans' compensation and pensions,

---

19/ 34 C.F.R. § 106.2(g) (1983).

20/ 104 S. Ct. at 1218 n.13.

21/ Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

22/ 104 S. Ct. at 1228 (Brennan, J., dissenting).

> civil service and railroad retirement benefits. Contrary to assertions that have been made, title VI will have no practical effect on such programs. . . . It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs. 23/

However, S. 2568 makes several changes which cast doubt on the continued validity of the proposition that civil rights laws relating to federal funding do not create coverage through general welfare assistance. The much-debated "program or activity" phrase in Title VI (and the other statutes involved in S. 2568, which all use these terms) has been held to be the key language showing Congress' intent that general assistance payments not trigger coverage. 24/ S. 2568 would remove this language from the statutes, which may suggest an intent to change the former approach to general assistance payments to individuals.

In addition, in place of the "program or activity" language, S. 2568 substitutes "recipient of Federal financial assistance." An extremely broad new definition of "recipient" would also be placed in the statutes, including "any . . . private . . . institution . . . to which Federal financial assistance is extended . . . directly or through . . . a person." The enactment of this language could also be viewed as evidence of intent to extend the application of these statutes to general assistance payments.

Furthermore, while the definition in S. 2568 of "recipient" is taken from language in existing regulations, 25/ the new statutory definition omits an important exception for general assistance payments found in the definition of "recipient" in the regulations. In implementing congressional intention that general assistance to "ultimate

---

23/ 110 Cong. Rec. 6544-45 (1964). See also id. at 6562 (statement of Senator Kuchel); Bob Jones University v. Johnson, 396 F. Supp. 597, 602 n.16 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

24/ Bob Jones University v. Johnson, 396 F. Supp. 597, 602 n.16 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

25/ See, e.g., 34 C.F.R. § 106.2(h) (1983) (Title IX regulations).

recipient[s]" will not make "other persons with whom he [or she] deals . . . participants in or beneficiaries of these Federal programs," 26/ regulations under Title VI and section 504 of the Rehabilitation Act contain the following limitation on the definition of "recipient": "but excluding the ultimate beneficiary of the assistance." 27/

The deletion of the "program or activity" language, the broad definition of "recipient," and the omission of the limiting language contained in the regulations from which the definition was taken may well convince a court that Congress was aware of what it was doing and intended the new language to have a broader application than the former understanding and construction of these statutes would permit.

C. Does S. 2568 Broadly Expand Agency Termination Power?

A critical feature of the remedial schemes under Title VI and Title IX is the so-called "pinpoint" termination power of the regulating agency. 28/ The power of agencies to terminate funds is thus limited to the "particular program, or part" of an institution which is not in compliance with the statute or regulations. Senator Humphrey stated in 1964 that this statutory limitation was "designed to limit any termination of Federal assistance to the particular offenders in the particular area where unlawful discrimination occurs. . . . [T]he termination shall affect only the particular program, or part thereof, in which such a violation is taking place." 29/ The rationale behind the

---

26/ 110 Cong. Rec. 6544-45 (1964) (statement of Senator Humphrey).

27/ 34 C.F.R. § 104.3(f) (1983) (Department of Education regulations implementing section 504). See, e.g., 7 C.F.R. § 15.2(e), 15b.3(f) (1984) (Department of Agriculture regulations implementing Title VI and section 504); 32 C.F.R. § 300.2(g) (1983) (Defense Department regulations implementing Title VI). The Department of Education's Title IX regulations omit this limitation on the definition of a "recipient," 34 C.F.R. § 106.2(h) (1983), presumably because the Department does not extend general assistance welfare-type benefits to individuals.

28/ 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

29/ 110 Cong. Rec. 12689 (1964). For a summary of the pinpoint provisions of Title VI and Title IX, see Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L.J. 49, 64-67 (1976).

"pinpoint" termination power was that "Title VI is not punitive." 30/ In addition, the intent of the program-specific limitation in Title VI "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." 31/

The sponsors of S. 2568 state that the "bill also retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law." 32/ S. 2568 would provide that termination of funds is "limited in its effect to the particular assistance which supports . . ." the noncompliance, 33/ rather than to the "particular program, or part" where noncompliance is found. The term "supports" in S. 2568 is ambiguous and is capable of gutting the pinpoint termination provision currently in the statutes and regarded by original congressional sponsors to be an essential component of the remedial scheme. For example, any time federal funds to one department in a university (or another large organization, such as a state) could be said to effectively increase the funds available to some other department by some amount, it could be said that the federal assistance to a complying department "supports" the noncomplying department and thus funds could be terminated for a department which was in compliance with the statutory requirements. Such an interpretation finds some support in Senators Kennedy and Packwood's statement regarding S. 2568 that the "requirement of a nexus . . . could be direct or indirect." 34/ In addition, since the "program . . . or part"

30/ 110 Cong. Rec. 6544 (1964) (statement of Senator Humphrey).

31/ Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis in original).

32/ 130 Cong. Rec. 54587 (daily ed. April 12, 1984) (joint explanation of Senators Kennedy and Packwood).

33/ 20 U.S.C. § 1682 (italicized words are added by S. 2568).

34/ 130 Cong. Rec. S4587 (daily ed. April 12, 1984).

language limiting the termination power has nothing to do with reversing the Supreme Court's program specificity holding in Grove City, a future court interpreting the change may well conclude that Congress considered and intended to significantly broaden the termination power. Such a significant expansion of the total remedial scheme has ramifications so extensive that clarification of this issue is imperative before action on S. 2568 is taken.

D. Are Parochial Schools or Other Religious Organizations Subject to Federal Jurisdiction Under S. 2568?

Church-related elementary and secondary schools receiving no direct federal financial assistance have tended to be exempt from the coverage of Title IX, even though the schools or their students may receive certain forms of aid from state governments. However, under S. 2568 they could possibly be covered under either of two theories. Under one theory, parochial schools that are organizationally related to a collection of church-owned entities could now be subject to regulation under S. 2568's "trickle down" or "trickle up" 35/ extensions of jurisdiction from one entity to another. For instance, if a Church owns hospitals as well as schools, its schools might be covered when its hospitals receive a federal research grant or perhaps provide services to medicare patients.

Under the "trickle up" aspect of the "recipient" definition, it seems fair to ask also whether the Church itself in this example is subject to regulatory jurisdiction. It would be a "private institution", a "subunit" of which is receiving federal financial assistance "through another person," just as a school is a "recipient" when its students receive aid. This circumstance would also raise the questions discussed below about violations of the Establishment Clause.

Under the other theory, a parochial school receiving any assistance from a state government might arguably be included as an "assignee" of a State receiving federal aid. This would appear to be the case whether or not the funds sent by the State

---

35/ See testimony cited at n.18, supra.

to the private school are themselves federal funds, since the State's ability to provide financial assistance to the private school is clearly "supported" by any federal assistance given the State to offset its other educational obligations. In this sense, a State that is assisted in meeting its obligations by a federal grant is much like a student whose federal grant enables the student to pay tuition costs, even if the student uses his or her own funds for tuition and the grant for other expenses.

E. An Unconstitutional Establishment of Religion?

S. 2568 expands on the basic theory of the Grove City case by making all "transferees" of assistance into "recipients" for purposes of statutory coverage. The federal assistance programs involved are, of course, already made widely available to church-related institutions. When these circumstances are examined in light of Supreme Court case law, S. 2568's total blurring of direct and indirect forms of governmental aid that may benefit religious entities probably creates an unconstitutional establishment of religion.

Ever since the first parochial school aid case, Everson v. Board of Education, 36/ the question whether governmental aid was extended to the families of school pupils or to the schools themselves has been a critical issue in Establishment Clause analysis. As the Court stated in Everson, "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents. . . ." 37/ And in its most recent case on the same subject, Mueller v. Allen, 38/ the Court said, in upholding the constitutionality of parents' state tax deductions for school expenses, "It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct

---

36/ 330 U.S. 1 (1947).

37/ Id. at 18.

38/ 51 U.S.L.W. 5050 (1983).

transmission of assistance from the state to the schools themselves." 39/ Whether aid to parochial schools was "direct" or "indirect" was, then, a crucial distinction in these cases. Aid to students and/or their families has been treated as "indirect", thus making certain forms of such aid constitutional, even though the Court also recognized in Mueller "that financial assistance to parents ultimately has economic effects comparable to that of aid given directly to the schools attended by their children." 40/ However, under the Court's ruling in Grove City, the concept of which is greatly expanded in S. 2568, aid to students is regarded as aid to the colleges they attend on an indirect benefit theory. Establishment Clause issues were not raised by the parties to Grove City, but an application of its facts to more formally church-related colleges would clearly raise the issue.

The test for Establishment Clause violations is much more flexible in the context of colleges and universities than it is in parochial schools. However, the Supreme Court cases upholding governmental aid to church-related colleges have established some fundamental criteria that are probably violated by S. 2568's blurring of direct and indirect aid. The Court has allowed state aid to church-related colleges when the funds were used to construct buildings intended to be used exclusively for non-sectarian purposes on campuses that were not "pervasively sectarian." 41/ And in the more recent case of Roemer v. Board of Public Works of Maryland, 42/ the Court upheld the constitutionality of direct financial aid by a state to a church-related college because it found that the college was not pervasively sectarian and that secular activities alone were funded by the state aid. In Roemer, the college made an annual accounting of funds

---

39/ Id. at 5053.

40/ Id. (emphasis added).

41/ Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

42/ 426 U.S. 736 (1976).

received from the state in order to show that these funds had been used only for "secular" activities on the campus.

If aid to students at church-related colleges and universities is legally regarded as aid to the institutions, the Roemer test cannot be satisfied unless the colleges both keep track of fund uses and can show exclusive secular use. But when a student on a federal grant pays his tuition, who knows whether the tuition is being paid from grant sources or private sources? Students obviously co-mingle their personal funds with grant funds. Through how many transactions and "transferees" must a careful accounting follow to determine secular use? The reality is, of course, that student aid is to students, and student aid alone should not violate the Establishment Clause under the prior cases. The Establishment Clause ramifications of regarding student aid as institutional aid make clear that S. 2568's excessive stretches of logic designed primarily to find more "recipients" for regulatory purposes will cast serious doubt on the constitutionality of all student aid programs that affect church schools.

It could be argued that the religion exemption contained in Title IX might, at least as to that statute, satisfy any Establishment Clause concerns. Such is not the case, however, because Title IX's religion exemption is not a complete exemption from statutory coverage. The exemption is limited to circumstances where application of Title IX "would not be consistent with the religious tenets" of a sponsoring church. More importantly, this exemption intends to avoid undue interference with religious liberty; it is not designed to avoid an unconstitutional establishment of religion.

This potentially significant ambiguity could be resolved by amending the definition of "recipient" in such a way that aid to students is not regarded as aid to institutions. Such an amendment would also be more consistent with the indirect/direct distinction recognized by the Supreme Court in the parochial school aid cases.

F. Putting at Risk the Concepts of Tax Exemptions and Tax Credits?

One of the most far-reaching potential consequences of S. 2568 is that it proceeds from the basic theory that any entity, public or private, state or federal, which receives indirect support from federal financial assistance should be subject to compliance with a broad and stringent range of federal laws as a condition of receiving the indirect benefit. The indirect benefit idea clearly underlies the assumption that aid to students constitutes aid to the institutions they attend. The same idea pervades the Bill's elaborate definition of "recipient," which includes "any public or private agency, institution . . . or other entity (including any subunity of any such . . . entity) . . . to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

As unlimited as this language is, it is still unrealistic to imagine that it would by itself seriously raise the question whether tax-exempt religious and other organizations are, by virtue of the "support" or indirect benefit they receive from their tax exempt status, subject to the civil rights laws. However, the utter disregard in the language of S. 2568 for the lines that have traditionally marked the boundaries between the public and private sectors or the boundaries between federal and state sectors 43/ makes it irresistible to conclude that this law, if enacted, surely brings the nation a major step closer to the day when tax-exempt status may be conditioned on compliance with the federal public policies reflected in not only the civil rights laws, but other major federal legislation. To lump all the categories of the non-discrimination laws together in one breathtaking extension of federal jurisdiction, as S. 2568 does, at least suggests that Congress would one day be willing to condition all tax exemptions on compliance with the terms of "public policy" outlined in this very Bill. That possibility should be cause for

---

43/ See the testimony of Wm. Bradford Reynolds, n.18, supra.

sober reflection by all who are interested in the activities of charitable institutions in the United States.

These are only some of the major ambiguities which would result from the passage of S. 2568 after little more than superficial consideration by Congress. Congress could obviously clarify these and other ambiguities in the Bill, but only if it is willing to take adequate time for detailed consideration of a complex statutory scheme that is as intricate as it is significant. S. 2568 is not a proposal that appropriately lends itself to a congressional procedure designed to avoid, rather than encourage, careful scrutiny.

III. Particular Areas of Harm to Independent Colleges from Campus-Wide Coverage of Title IX.

Even if one reads the areas of ambiguity narrowly, substantial harm is still done by S. 2568 to independent institutions receiving no federal aid beyond what their students receive. This harm arises primarily from the extension of campus-wide coverage under Title IX. Without S. 2568, of course, coverage would be limited to the financial aids office.

A. The Costs of Compliance.

Even under prior anti-discrimination laws (which have carried a smaller compliance burden than is contemplated by S. 2568), and even at large public universities (which have received federal funding to help pay the administrative costs of compliance), "[t]he cost of implementing federally mandated social programs at the university level has been estimated at five to eighteen percent (5-18%) of tuition revenues, which exceeds the total amount of all voluntary giving to institutions of higher education in the United States." 44/

44/ D. Oaks and C. Durham, "Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights," in Accountability — Keeping Faith With One Another, p. 69 (National Congress on Church-Related Colleges and Universities, 1980).

The proposed Bill would increase this already crushing task by expanding the compliance obligation across an entire campus, regardless of the kind or extent of any federal funding. This means a college receiving no federal assistance other than student aid would receive no additional help from government or other outside sources to pay for the new campus-wide layer of trained personnel and intricate procedures necessary to satisfy its compliance duties. Not only would this unfunded new duty cover all educational activities, it would evidently cover all non-educational functions of a college as well. Even beyond this, S. 2568 gives all federal funding agencies authority to regulate all of a college's programs, so that the compliance burden is conceivably multiplied in geometric proportions. 45/

The prior philosophy in all four of the statutes affected by S. 2568 was that there should be some kind of rational relationship between (1) the amount and extent of federal aid received by an institution and (2) the amount and extent of the regulatory and compliance burden. That was one of the reasons why supervisory and enforcement authority was limited by the statutes to the program or activity that actually received the federal assistance.

One wonders not only about the source for the personnel and the budget needed to sustain these vast new costs at colleges and universities, but also where the personnel and budget will come from to sustain the concomitant supervisory and enforcement burden inevitably to be felt by federal agencies. In a day when both higher education and government have been nearly panic stricken over their own financial deficits, it is not hard to wonder whether the Congress is acting with a full consciousness of its actions.

45/ This fact and some of its implications are addressed in the House testimony of Assistant Attorney General Reynolds, supra n.18, and in the text accompanying nn. 16-34, supra.

The limited resources of the small, independent colleges of AAPICU may make it virtually impossible for them to fully shoulder their compliance duties. Their only answer may be to ask for additional federal funds to cover compliance costs. Then not only do national educational costs increase, but the claim that these schools are truly independent of the federal government really is destroyed — not because the schools are dependent on government for educational purposes, but because they are dependent on government to satisfy the government's purposes.

B. The Costs of Yielding Educational Independence.

There may be some people today who assume the only reason a private school would pursue an independently defined mission is to cover up some kind of invidious discrimination. That idea would not be seriously entertained by those who know, even superficially, the history of education in this country or the theory of democratic pluralism on which our entire political system rests. Our educational system — especially at the level of higher education — has long reflected and cherished the diversity that is so natural and so healthy in a democratic system. For centuries, the landscape of U.S. higher education offered a rich variety of colleges and universities, each a one-of-a-kind reflection of the unique vision of its founders. Many were funded by churches seeking to provide a well-grounded education within the context of their religious principles. Different schools had different characters.

This diversity manifested a deeply-held ideal that individuals and institutions should be permitted to pursue the goals of education in their own ways. Some colleges believed that the educational process can best take place where the student body is limited to one sex or the other; others, where religious devotion is integrated with secular learning; others, where learning is totally secularized; others, where social interaction and recreation are restricted; others, where social interaction and recreation are encouraged; others, where technical and vocational skills are emphasized; and still

others, where a devotion to classical liberal arts education is so complete that student preoccupation with careers is thought to be inappropriate.

Which of these approaches is correct? The government of the United States does not know, nor should it try to decide with finality. Like the economic marketplace, the marketplace of ideas is well-served by divergent approaches and brisk competition. In addition to offering the consumer a wide array of choices, the competitors learn from one another and the entire marketplace is improved. Perhaps more significantly, the variety and individual integrity of such diverse approaches comes close to the heart of the nation's cherished belief that each man or woman should be free to define the meaning and purpose of his or her own life. That freedom includes a student's right to choose his or her own approach in a college education.

When the advocates of any single set of social issues or any single view about the "best" educational environment, or the "best" approach to education for the members of either sex, would seize the power of law and government to impose their views about educational philosophy and methods to the exclusion of all others, there is something wrong with our collective understanding about the place of education in promoting different individual paths and choices in the pursuit of personal meaning.

Being more specific about the reasons why private (especially religious) colleges have cherished privacy, consider the thoughts of Mr. Justice Jackson in a 1947 Supreme Court opinion: "I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church . . . . Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests." 46/ Yet it was precisely because he so well understood the nature and purpose of parochial schools that Justice Jackson in that

---

46/ Everson v. Board of Education, 330 U.S. 1 (1947) (dissenting opinion).

same case gave this warning, which in today's context seems so relevant: "If the state may aid these religious schools, it may therefore regulate them." 47/

But the Supreme Court has consistently believed the state should not regulate religious schools. The case from which these lines are taken marked the beginning of a long and frustrating struggle in the Supreme Court and elsewhere about the best way to encourage private, church-related education without undermining the independence which is its lifeblood, yet also without undermining our constitutional commitment to the idea that government should not establish religion. Now, many years, many state legislative enactments, and many Supreme Court cases later, a few principles have been developed by which the Court has struck a workable balance between the competing concerns. Regulation by the states of a kind that would irreparably damage the religious character of the parochial schools has been avoided. Inappropriate levels of financial aid to church-related schools have been avoided. Many problems, including large financial ones, remain. But the cause of the parochial schools has been accommodated within our constitutional framework. The distinction between direct and indirect aid has been vital. 48/ Through it all, we seem to have believed what the Supreme Court said in 1925 about the right of private schools to exist with a restrained sense of state accommodation alongside the public schools: "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 49/

47/ Id.

48/ See text accompanying nn. 36-42, supra.

49/ Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

At the level of higher education, there are many reasons why independent and church-related colleges and universities have struggled and floundered in an increasingly secularized society. But one of the primary causes of their decline as a serious educational force in recent years has been their inability to obtain necessary financial sustenance. Tuitions can only rise so high, and then they are out of reach for most of those who desire a private education. The federal government has recognized the growing financial plight of all of America's colleges and universities, and remarkable increases in federal student and other financial aid have blessed the entire nation in the last several years. But we have taken an approach to student financial help for students desiring to attend private religious colleges that has somehow misunderstood the need to provide necessary resources without at the same time forcing the independent schools into some monolithic, quasi-public mold that compromises their entire reason for existing as an alternative to the public colleges and universities.

The patterns of financing have, of course, been only one factor in the increasing homogenization of higher education. But whatever the causes, both the nation and the overall cause of higher education are badly served by measures that destroy our system's few remaining vestiges of diversity and pluralism. As long ago as 1971, the distinguished Report on Higher Education prepared by the Newman Commission and distributed through the U.S. Office of Education observed as its basic criticism that our "system of higher education as a whole is now strikingly uniform." The Commission found that college students have a choice:

> not . . . between institutions which offer different modes of learning, but between institutions which differ in the extent to which they conform to the model of the prestige university . . . . If . . . one believes that an important function of the higher education system is to offer alternative models of careers and roles, including those which challenge and change society, then the homogenization of higher education is a serious problem.

For students who will be frozen out of private colleges that are unable to admit anyone receiving personal federal aid, the message of this report is particularly

unsettling. A student may be attracted to a private college or university precisely because of its distinctive environment and independent spirit, despite its higher tuition. But because of the student's or the parents' income level, federal assistance might be necessary for him or her to attend. What benefit is there to the student if that assistance is withheld? What damage is done to the possibility of providing every young man or woman who desires it a college education consistent with his or her own choice among all the educational models of social, intellectual, and spiritual life?

These thoughts on why independence matters to the nation's private colleges and their students are offered primarily to show that there are legitimate countervailing interests at stake that deserve a complete hearing in the understandable quest to extend civil rights jurisdiction to the uttermost limits. When no questions about those limits are asked, let alone thoughtfully answered, the nation pays a heavy price in terms of the variety and quality of American education that is available.

As observed by the Carnegie Council, "the special contributions of independent colleges and universities depend in large measure on their ability to operate as autonomous institutions, subject to a minimum of governmental control . . . . There is a danger that federal and state regulations may go so far as to deprive those institutions of the freedom and flexibility needed to perform their missions properly." 50/ Surely a way can be found to accommodate (1) the need for independent colleges to remain independent with (2) the rights of students both to financial aid and to choose their own kind of college education.

C. Special Concerns Under Title IX for the College with a Religious Mission.

1. The General Problem. Church-related institutions and other colleges with an essentially religious orientation have been deeply concerned since its

---

50/ Quoted in Dallin H. Oaks, "Facing the Future: A Distinctive Role for the Church-Related College," National Congress on Church-Related Colleges and Universities, Notre Dame University, June 22, 1979.

enactment about the impact of Title IX on their overall religious liberty. There is a qualified exemption in the statute providing that the law does not apply when its application "would not be consistent with the religious tenets" of "a religious organization" which "controls" an educational institution. However, many colleges and universities which have strong institutional commitments to religiously based moral values are not protected by the exemption, because they are not formally "controlled" by a religious organization.

Even for controlled institutions, the exemption leaves the burden of proof on the college to convince the Department of Education that there is in fact a "specific tenet of the religious organization" 51/ at stake in a particular situation and that it conflicts with the application of some portion of the law or regulations. Because this procedure leaves questions of interpreting religious doctrine in governmental hands, its constitutionality as well as its wisdom is questionable.

With S. 2568 expanding the coverage of Title IX across an entire campus, even when there is no federal assistance other than aid to students, concerns about conflicts with religious liberty principles are correspondingly expanded.

Not only the religion clauses but the entire spirit of the First Amendment protects a private institution of higher education from being forced to redirect its distinctive educational mission and environment to meet ends chosen by government. In this sense, educational institutions share the fundamental values of the First Amendment with the press, with religious institutions, and with our political institutions, which thrive through the protections given free and robust political discourse. 52/

Within the protection of the First Amendment, church-related schools have played a particularly important role as "mediating structures" between the individual and

---

51/ 34 C.F.R. § 106.12(b).

52/ See text accompanying nn. 78-84, infra.

the larger society, especially as the State has loomed larger in its role. Modern civilization is soaked through with a sense of anomie and alienation, heightened by feelings of helplessness against ever increasing concentrations of power in such "megastructures" as the boundless government bureaucracy, the business conglomerate, and the national labor union. 53/ In the midst of all this, increasing attention is being given to the personal and the public policy significance of such "mediating" structures as families, neighborhoods, churches, and voluntary associations:

> Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is 'delegitimized.' When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disapears.
>
> The attractiveness of totalitarianism . . . is that it overcomes the dichotomy of private and public existence by imposing on life one comprehensive order of meaning. 54/

Mediating structures are "the value-generating and value-maintaining agencies in society." 55/ Therefore, when these structures are inactive, society must look to the megastructures — notably the State — as a source of values. The totalitarian State gladly and aggressively assumes that role. The democratic State, on the other hand, makes no claim to be a source of personal meaning and values, nor would we allow it to. That role contradicts the assumptions on which our entire political system rests.

The family is for many people the major mediating and value-generating institution within the private sphere. 56/ Therefore, attitudes about family life, marriage, children, and the relationships between men and women are among the core

---

53/ P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy (1977).

54/ Id. at 3 (emphasis added).

55/ Id. at 6.

56/ This subject is enlarged upon within the constitutional context in Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests, 81 Michigan Law Review 463 (1983).

attitudes of life. Church colleges and universities, freely chosen as private institutions by the students who attend them, have traditionally regarded attitudes about family life and related value questions as central to the concerns of their students. Thus these schools have, as matters of both educational and religious philosophy, played a vital role in augmenting their students' own family and religious life in the process of value formulation and value transmission regarding family-oriented matters.

Attitudes about marriage and family are only one example of many value laden subjects that play an important role in the community of a church-related college. There are many other ways in which these colleges assume the role of mediating structures in the lives of their students. In this role, church schools act very differently from public schools, because state schools are extensions of the democratic state — itself part of the larger megastructures.

In general, Title IX, as broadened by S. 2568, would tend to establish an official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, and attitudes about marriage and family life. There are many strongly held views on these issues in contemporary society. They are far from the category of settled questions. On the contrary, they are exactly the kinds of issues Justice Jackson had in mind in his celebrated statement from the flag-salute case: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." 57/

Intrusive laws and regulations relating to family life and sex roles can be harmful to church-related colleges in two ways. One way is for the state to assume for itself the value transmission role by imposing, in a nearly totalitarian way, "one comprehensive order of meaning" about such personal questions. The other way is for the state

---

57/ West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943).

to imply by its regulatory authority that the nation's official and legally enforced value position about the role of the sexes is one of unisex neutrality, which is itself a value position so potent that it seems to mark any contrary view as illegitimate. Either way, a chill comes over the campus atmosphere and the very soul of a church college is threatened. Church-related colleges and universities desire independence not so they can discriminate, but so they can be discriminating — about many of life's ultimate questions.

2. Illustrations of Specific Concerns. Consider now a few specific examples of the way Title IX, as broadened by S. 2568, inappropriately intrudes on religious and moral values. The current Title IX regulations appear to require schools to be blind to the occurrence of abortion or extramarital sexual activity in decisions relating to school policies or student discipline. 58/ Yet many religiously oriented and other institutions believe there are serious moral principles at stake in such student behavior. Their commitment to these principles is unquestionably undermined by regulations that prohibit inquiries into or actions based upon marital or parental status, pregnancy or termination of pregnancy. 59/

It is unclear whether Title IX permits college teachers and counselors to talk with students about ways in which marriage may be compared to career choices or even personal student preferences. The regulations prohibit counseling students in ways that "permit or require different treatment of students" on the basis of sex. 60/ They also require that when "substantially disproportionate" numbers of one sex choose voluntarily certain courses of study or are classified by counseling and vocational testing materials

---

58/ 34 C.F.R. §§ 106.21(c), 106.40(b)(1), 106.40(b)(5), 106.57(b) (1983).

59/ In addition, colleges which stress high moral values and modesty may object to regulations which prohibit separate sex education classes, 34 C.F.R. § 106.34 (1983), and separate physical education classes (although separating the sexes within a physical education class is permitted in sports which primarily involve physical contact). Id. at § 106.34(c).

60/ 34 C.F.R. § 106.36(b).

in particular courses or classifications, the school must take affirmative action to ensure that the disproportion is not the result of sex discrimination in academic or other counseling. 61/ The chilling effect of this legalistic approach on sound academic and career counseling is especially noticeable when that counseling is placed in the larger context of student-teacher conversations in a church-related college about life's goals and larger purposes. Are some career choices more compatible with marriage goals than others? If so, is that question off limits in counseling for students for whom it is an important issue? What if there are religious attitudes about the significance of marriage that enter the counseling environment?

Sex-segregated housing for single students is allowed up to the point of maintaining "separate living facilities." But this language is uncertain enough to make it difficult for institutions to know how to govern their affairs in this highly sensitive area. 62/ If, for example, women generally prefer dormitories with cooking facilities while men prefer dormitories with cafeteria facilities, how is a college housing office to ensure there has been no discrimination in dormitory assignments? Suppose a college administration prefers to have dormitory buildings or wings segregated on the basis of sex. Does that constitute "separate living facilities"? When in doubt on such matters of judgment and interpretation, who should have the burden of proving whether there is discrimination — the college or the government?

Church-related schools and other colleges holding strong value orientations are often troubled that federal agency procedures tend to allow the "judgment call" issues in the sex discrimination area to be resolved in favor of agency discretion. Justice White has aptly observed that "the word 'discrimination' is inherently . . . ambiguous." 62a/

61/ 34 C.F.R. § 106.36(c).

62/ 34 C.F.R. § 106.32.

62a/ Guardians Association v. Civil Service Commission of the City of New York, 103 S. Ct. 3221, 3227 (1983).

The particular term "sex discrimination" is even more ambiguous, because some distinctions between males and females are inherent in nature. Whether those distinctions should be the basis for conclusions of illegal "discrimination" is unavoidably a matter of subjective judgment. It is the established practice of Congress to delegate such discretionary decisionmaking to federal agencies, often pursuant to vague statutory language — of which Title IX is a notable example. The Supreme Court allows broad agency discretion, giving regulations the force of law so long as they are "reasonably related to the purposes of the enabling legislation." 62b/ Thus, as a practical matter, future innovations and requirements under the heading of sex discrimination in education are limited only by the imagination of the Department of Education.

This means that a matter of conscience and belief having importance to a small, private college, but which may easily seem trivial to others, may require expensive litigation to ensure protection. When such First Amendment interests as religious liberty are involved, however, the presumption should be the other way: the college's judgment should prevail unless a given practice is shown to have harmful discriminatory effects.

For example, a former Title IX regulation provided that an educational institution could not "discriminate against any person in the application of any rule of appearance." 62c/ Pursuant to this rule, HEW decided that dress and grooming codes could not require different hair lengths of men than of women. One church-related university made enough of the issue in a formal exchange with the Office of Education that a gender-based hair length standard was allowed under Title IX's religious

---

62b/ Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). See generally K. Davis, Administrative Law Treatise § 7.8 (2 ed. 1980 and Supp. 1982).

62c/ 45 C.F.R. § 86.31(b)(5) (1976).

exemption. 62d/ In another case, it took a court ruling to invalidate the regulation as applied to a particular appearance code. 62e/ Eventually the regulation was rescinded; but the expense and effort in such cases has been enough to make independent schools very uneasy about the future prospects of needing to formally defend themselves when the procedural presumption is already against them. Whether the future issues involve regulating the content of textbooks or reviewing approaches to classroom instruction, the effect of being put so severely on guard simply has a chilling effect that subtly undermines a religious school's pursuit of its educational mission.

IV. Limitations on Federal Regulatory Power.

S. 2568 seems to assume there are no significant constitutional or policy reasons for restraining the reach of federal regulatory authority. However, there are several important reasons why Congress should consider the need for its own self-restraint before enacting this Bill, which proposes unusually bold extensions of federal power.

A. Limitations on the Spending Power.

The general rule regarding congressional authority is axiomatic under our theory of limited government: Congress must have some constitutional basis for its legislative enactments. Otherwise, this Bill could simply provide that no American shall discriminate against any other in any way. The authority for S. 2568 is obviously derived from the spending power, which gives Congress the right "to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 63/

62d/ Correspondence between Martin H. Gerry, Director, Office for Civil Rights and Dallin H. Oaks, President, Brigham Young University (1976).

62e/ Trent v. Perritt, 391 F. Supp. 171 (D. Miss. 1975).

63/ Grove City College v. Bell, 104 S.Ct. 1211, 1223 (1984) (emphasis added).

Reasonable people cannot quarrel, as a matter of public policy or logic, with the assumption that any governmental agency has the responsibility and the right to verify that public funds are spent for the purposes for which expenditures were authorized. This natural principle of accountability also assumes that "funds should not be expended in ways that run counter to legitimate government objectives, such as assuring that government property and facilities acquired with government financing are used without unlawful discrimination." 64/ However, in today's society, when virtually every public or private transaction is touched in some way by the ripple effects of federal spending, and when federal power seems far more potent than any other source of influence, there are enormous temptations to misuse the spending power. But if that power is manipulated to become a trojan horse in every office or conversation where the influence of federal spending is felt, it will quickly establish a unitary sovereignty that destroys crucial checks and balances by eliminating both federalism and the private sector.

Thus, the power to condition the receipt of federal funds on specified obligations is not unlimited, as both the Congress and the Supreme Court have long recognized. Congress has in the past been sensitive to the need to attach "reasonable" conditions to the receipt of federal funds. In enacting Title VI, and in subsequent civil rights legislation, Congress was careful to apply the regulatory scheme only to the specific program or activity receiving federal financial assistance, and to narrowly define the concept of recipient. 65/ Its purpose was arguably to ensure that the receipt of federal funds be accompanied by conditions that are directly and reasonably related to the objectives of the grant program itself.

64/ D. Oaks, "Facing the Future: A Distinctive Role for the Church-related College," National Congress on Church-related Colleges and Universities, Notre Dame University, June 22, 1979.

65/ See infra, text accompanying nn. 102-121.

The Supreme Court has also recognized substantial constitutional limits on the spending power. The most recent and most applicable formulation of the test establishing such limits comes from Grove City: 66/

> Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. E.g., Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981). Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a). Students affected by the Department s action may either take their BEOGs elsewhere or attend Grove City without federal financial assistance.

All of the operative terms in this test present problems for S. 2568. First, the conditions attached by the Bill to the receipt through student aid only of federal financial assistance by a private, independent college are no longer "reasonable." This is because removal of the "program specific" concept and the use of a virtually unlimited definition of "recipient" arguably destroys the needed rational connection between (1) the conditions imposed and (2) the purposes of the various forms of aid capable of triggering recipient status. It really is unreasonable to think that one federal grant to one student would alone justify the full burden of compliance with the intrusive regulations under these statutes.

Second, the conditions attached to the federal financial assistance under S. 2568 are very "ambiguous." Among many other major ambiguities, 67/ it is not at all clear which forms of federal aid have the Title IX regulatory burden attached.

Also, the combination of Grove City and S. 2568 make it possible that private, independent colleges and universities will become "obligated to accept" certain forms of federal financial assistance capable of bringing the institution under the rule of Title IX. For example, under S. 2568's definition of recipient, it is quite possible that a

---

66/ 104 S. Ct. at 1223.

67/ See Section II, supra.

student receiving welfare-type benefits would trigger "recipient" status for the university that he or she attends. 68/ Under these circumstances, a college might have no idea which of its students could, by the act of enrolling, subject the college to federal jurisdiction. 69/ The college could therefore be "obligated to accept" the federal financial assistance with no realistic way to "avoid the requirements of the law." 70/ For these reasons, S. 2568 may fail the spending power test explained in Grove City.

For its general statement of the scope of the spending power, the Court in Grove City cited Pennhurst State School & Hospital v. Halderman. 71/ That case involved application of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the Act). 72/ Halderman, a minor, retarded resident of Pennhurst (a state-owned and operated facility for the disabled) sued in a federal district court class action alleging unsanitary, inhumane conditions in violation of her civil rights, and specifically her rights under the Act. The Court of Appeals found that the Act created substantive rights in favor of the mentally retarded, that mentally retarded persons have an implied cause of action to enforce those rights, and that conditions at Pennhurst violated those rights.

68/ See Section II.B., supra.

69/ It is doubtful that a college attempting to maintain its independence by refusing admission to students receiving general assistance payments could even identify such students. The federal agencies administering such programs, with the exception of the Department of Education, are prohibited by statute from disclosing identifying information. 5 U.S.C. § 552a(b). State agencies participating in federal welfare programs are also instructed to restrict such information to agency personnel involved in the administration of the welfare program. See, e.g., 7 U.S.C. § 2019 (food stamps). Without voluntary disclosure by the student, it is difficult to see how the college could identify the students receiving such aid for the purpose of excluding them. If students receiving aid other than student education grants and loans can trigger regulation of the university (a result arguably permitted by the language of S. 2568, see Section II.B.), then the university is caught in the position of indirectly receiving federal financial assistance which it cannot identify or avoid.

70/ Grove City, supra, 104 S. Ct. at 1223.

71/ 451 U.S. 1, 17 (1981).

72/ 42 U.S.C. § 600 et seq. (1976 ed. and Supp. III).

The contrary argument was that in receiving federal funds for the handicapped under the Act, the State had never obligated itself to the affirmative duties which the Court of Appeals had found; specifically, the right to "appropriate treatment" in the "least restrictive" environment. In analyzing whether receipt of funds under the Act carried with it these affirmative duties, the Supreme Court developed the following test:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . [emphasis added]. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation. 73/

Pennhurst also cited Fullilove v. Klutznick, 74/ which stated that the spending power requires Congress to impose conditions that are "narrowly tailored" to the achievement of the legislative goal. 75/ The Pennhurst and Fullilove tests pose some serious difficulties for S. 2568, again because the Bill is such a study in ambiguity.

For example, the language as presently drafted leaves it far from clear what a college must avoid to preserve its independence. A college could become a recipient of federal financial assistance without "knowingly" or "voluntarily" receiving any federal aid, by the unilateral actions of its students. There is no way to determine with certaintly who is a "recipient" under the terms of the Bill, nor which forms of federal

---

73/ Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) (emphasis added).

74/ 448 U.S. 448 (1980).

75/ 448 U.S. at 480.

financial assistance carry what consequences. It may not even be possible to avoid these consequences once they are determined.

These uncertainties are created as well as compounded by the way S. 2568 subjects each individual "recipient" to the jurisdiction of multiple federal agencies. As one scholar who examined the Bill observed, "Assistance of any kind to any part of any public or private enterprise will trigger all the civil rights regulations and enforcement procedures of all the cognizant federal agencies with respect to all other parts of the enterprise, however remote they may be from the part being aided." 76/ Different federal agencies have established different tests for measuring compliance. Thus, for educational institutions to be aware of the expectations of the Education Department will no longer be sufficient. Moreover, "[m]any federal agencies have long since built into their antidiscrimination regulations and procedures various 'effects' tests, quotas and other 'outcome' standards that may foster reverse discrimination." 77/ Some of these tests may have been established in an especially demanding regulatory context, such as racial discrimination, making it unclear whether those same tests will apply to other forms of discrimination as determined by agencies having different enforcement objectives. The net result of the Court's analysis in Grove City, Pennhurst, and Fullilove is that S. 2568 has great difficulty in satisfying the basic requirements for a valid exercise of the spending power. Those basic requirements include the need for reasonable and unambiguous conditions, voluntarily and knowingly accepted with a complete view of the consequences.

76/ C. Finn, "Civil Rights in Newspeak," Wall Street Journal, May 23, 1984.

77/ Id.

B. The Spending Power, The First Amendment, and "Unconstitutional Conditions."

There is an alternative line of reasoning which also acts as a limit on the spending power, known as the doctrine of "unconstitutional conditions." 78/ Under this doctrine, governmental entities may not condition access to funds or other benefits in ways that force potential recipients to sacrifice a constitutional right in order to obtain the benefit. This is particularly true when the public benefit is vital. As explained by the Supreme Court:

> If the state may compel the surrender of one constitutional right as a condition of its favor it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. 79/

Although this doctrine originally developed in the context of foreign corporations seeking to enter a state to do business, it has long since been applied in other contexts, including receipt of welfare-related benefits. 80/

The major constitutional provision which would, under the doctrine of unconstitutional conditions, limit the spending power in favor of independent colleges and universities is the cluster of freedoms associated with the First Amendment. The Supreme Court has been particularly adamant in its refusal to sustain conditions upon public benefits if they "inhibit or deter the exercise of First Amendment freedoms." 81/ As expressed by two constitutional law scholars:

> Since independent colleges — especially church-related ones — are intimately involved in the assertion, cultivation, and

---

78/ See L. Tribe, American Constitutional Law 510 (1978).

79/ Frost & Frost Trucking v. Railroad Comm'n, 271 U.S. 583, 594 (1926) (a case involving an attempt to require a private trucker to become a common carrier as a condition to using the highways, where the state had the acknowledged power to prohibit the use of the public highways in proper cases).

80/ Sherbert v. Verner, 374 U.S. 398 (1963).

81/ Id. at 405 (1963).

> transmission of First Amendment values, they are uniquely situated to avail themselves of the doctrine of unconstitutional conditions. Whatever additional constitutional rights might be relevant to the protection of various aspects of the life of a university community, it is clear that a variety of First Amendment values — freedom of speech, of association, and often, of religion — are central. Indeed, as one author has expressed it, the university is "the principal institutional focus of American intellectual life. . . . The university is, in sum, the single institution in American society that exists solely to nurture and pursue values enshrined in the First Amendment." 82/

And in one of the most oft-cited statements of the Supreme Court on academic freedom, Justice Frankfurter underlined the conditions that make universities protected fountainheads of pluralism: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the 'four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 83/ When this general interest is buttressed by genuine religious liberty interests, it is a matter of no small constitutional significance.

For those institutions whose very purpose is to nurture and sustain First Amendment values (newspapers, churches, and universities), regulation of the institution itself also creates an impermissible "chill" on the First Amendment rights of those within its institutional framework. The chilling effect of heavy regulation takes on increased significance when a private college nurtures religious values, even if it is not "controlled" by a religion. In addition, small, independent colleges and universities, often comprised of students who share many common values, reflect decisions by their students to exercise their rights to freedom of association by enrolling in such a school. This trilogy of First Amendment freedoms (speech, religion, and association) together with the private,

---

82/ C. Durham & D. Oaks, supra n.44 at 76 (citation omitted).

83/ Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

independent status of such schools, means that the buffer zone protecting these freedoms should be quite large. If "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny," 84/ then any regulation of institutions impacting upon freedom of speech, religion, and association would also require the highest level of scrutiny.

In summary, under the doctrine of unconstitutional conditions, Congress' power to attach limits on federal assistance to private colleges and universities is limited by the First Amendment. Such conditions must be narrowly tailored, and not have a chilling effect on First Amendment freedoms. This is particularly true where the federal financial assistance comes to the university in the obtuse fashion contemplated by S. 2568.

C. Federalism as a Limitation on Congressional Authority.

With respect to its effect on state and local governments, S. 2568 is intrusive to an extreme degree. As outlined by Assistant Attorney General Reynolds, the problem stems from the Bill's almost limitless definition of "recipient." The definition provides that "when Federal financial assistance is extended to a 'subunit' (not defined) of a larger 'entity' (not defined), the larger entity itself — whether it be public or private — can be viewed as the 'recipient' if it is deemed to have 'receive[d] support from' (not defined) the federal funds going to the subunit." 85/ This definition covers all the subunits of a state if any subunit of the state receives any aid. "Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of federal intrusiveness into state and local affairs under H.R. 5490 [the House companion bill to S. 2568] seems to be virtually complete." 86/

84/ NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958).

85/ See n.18, supra.

86/ Id.

In addition to increased scope, the enforcement provisions for both governmental and private litigants are greatly expanded. Every state and local government entity will be subject to the jurisdiction of every federal agency which extends federal financial assistance to the state or one of its subunits.

The power of Congress with respect to state governments is not limitless. In National League of Cities v. Usery 87/ the Supreme Court struck down Congress' attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments. Sensitive to concerns of state sovereignty, the Court drew from the Tenth Amendment an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution." 88/ This was grounded in a concern that the imposition of intrusive federal regulations on state governments would "allow 'the National Government [to] devour the essentials of state sovereignty.' " 89/

This Tenth Amendment limitation on the Commerce Clause was further articulated in Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 90/ which involved a pre-enforcement challenge to the constitutionality of the Surface Mining Control & Reclamation Act of 1977 (SMACRA). SMACRA required a regulatory program for surface mining to be proposed by the state, consistent with minimum federal standards, or adoption by the state of the federal program. The Court in Hodel developed a test for Tenth Amendment challenges to Commerce Clause statutes, and under that test upheld SMACRA:

87/ 426 U.S. 833 (1976).

88/ Id. at 841.

89/ Id. at 855 (quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

90/ 452 U.S. 264, 286-288 (1981).

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " 91/

For statutes that satisfy each prong of this test, a final inquiry requires weighing whether "the federal interest advanced is such that it justifies state submission." 92/

Finally, in EEOC v. Wyoming 93/ the Supreme Court re-emphasized the Hodel test in a case involving a challenge (under the Age Discrimination in Employment Act of 1967) to a Wyoming statute requiring the retirement of state Fish and Game Department wardens at age 55. The Court upheld application of the Age Discrimination in Employment Act to the states. It distinguished National League of Cities based on the differing levels of intrusiveness, focusing on the third prong of the Hodel test.

Taking these three cases together, it is probable that S. 2568 would not survive a Tenth Amendment challenge.

First, the bill regulates the "States as States," satisfying the first prong of the Hodel test.

Second, at least with respect to Title IX and perhaps with Section 504 of the Rehabilitation Act of 1973, the bill regulates "matters that are indisputably attributes of state sovereignty." Although the Supreme Court has not clearly defined this concept,

---

91/ 452 U.S. at 287-288 (citations omitted; emphasis in original).

92/ Id. at 288 n.29, citing Fry v. United States, 421 U.S. 542 (1975); National League of Cities, supra, at 856 (Blackmun, J., concurring).

93/ 103 S. Ct. 1054 (1983).

education has without question traditionally been regarded as a matter of state sovereignty. 94/

Third, it is "apparent that the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " 95/ The Court explained in EEOC v. Wyoming, that this question depends "on consideratons of degree." 96/ S. 2568 involves a greater degree of impairment than any of the cited cases. Hodel merely involved a requirement that the state regulate surface mining according to a federal minimum standard. EEOC v.Wyoming involved application of a federal law regarding mandatory retirement, which left the states free to continue their own retirement policies, if they can demonstrate that age is a "bona fide occupational qualification." 97/

In the one case that sustained the Tenth Amendment challenge, the Court found that application of the Fair Labor Standards Act to the states would have the adverse impact of diverting state funds from other vital state programs to pay workers the federal minimum wage and overtime rates. The inquiry was not so much factual as legal; whether the federal legislation would have a direct and obvious effect on the ability of the states to allocate their resources. 98/

The Court in EEOC v. Wyoming also distinguished National League of Cities by noting that in National League of Cities the Court had found "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decision

---

94/ See, e.g., San Antonio Independent School District v. Rodriguez, 409 U.S. 822 (1973).

95/ Hodel, 452 U.S. at 287-288.

96/ 103 S. Ct. at 1062.

97/ Id.

98/ 426 U.S. at 851-852.

making. . . Nothing in this case, however, portends anything like the same wide-ranging and profound threat to the structure of state governance." 99/

It is apparent that the effects of S. 2568 exceed those of Hodel and EEOC v. Wyoming in its intrusiveness. It is comparable in scope to National League of Cities; in fact, both the scope and compliance burden are probably much greater. Therefore, S. 2568 would have an even greater effect on the ability of the states to allocate their resources.

The final criterion focuses on whether the federal interest is such that it justifies state submission. Neither EEOC nor Hodel analyzes this test in the majority opinions; in National League of Cities it was implicitly satisfied. The federal government obviously has a great interest in eliminating discrimination. Whether that interest exceeds its interest under the Fair Labor Standards Act in National League of Cities is unclear. But the analysis does not stop with identifying the interest. The means used to accomplish Congress' purpose must also be reasonably related to the interest at stake, considering, perhaps, the degree of actual discrimination involved and the past history of discrimination. On that issue the very limitlessness of S. 2568 together with the absence of evidence of new discrimination make the Bill susceptible to serious challenge.

In its general consideration of S. 2568 Congress might do well to consider the statement of Justice Black in Younger v. Harris:

> [O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . What the concept does represent is a system . . . in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. 100/

99/ 103 S. Ct. at 1062.

100/ Younger v. Harris, 401 U.S. 37, 44-45 (1970).

The cases discussed here involve the Commerce Clause, but are clearly analogous to Congress' power under the spending power. Indeed the spending power has always been thought to be narrower than, or at most co-existent with, the Commerce Clause. 101/ Whether or not S. 2568 finds itself within the outer reaches of Congress' power, the grave policy concerns about such a serious intrusion into state sovereignty, so hastily enacted, ought to be reason for considerable reflection.

V. Recommendations and Amendments

The sponsors of S. 2568 correctly regard this as a time to reconsider, along with other statutes, Title IX. The nation has now had 12 years of experience since the initial enactment of Title IX, aided by considerable interpretative refinements through case law and the regulatory work of the Education Department under both Democratic and Republican administrations.

A. Redraft S. 2568.

This statement of testimony has outlined numerous reasons why broadening Title IX as proposed by S. 2568 is unwise and even dangerous. My first specific recommendation, therefore, is that the Bill as written be withdrawn and re-drafted in a way that responds to the many serious questions it leaves unresolved. That process will also allow a much needed opportunity to consider the need for other refinements and amendments in the law.

Through this means or, as an alternative, by means of specific amendments to S. 2568 as now written, consideration should be given to two particularly needed amendments in the existing law as interpreted by the Supreme Court in the Grove City case. These two proposed areas of amendment follow.

101/ See L. Tribe, American Constitutional Law (1978); Fullilove v. Klutznich, 448 U.S. 448, 475 (1980).

B. Broaden the Religious Exemption in Title IX.

Earlier portions of this testimony have treated the reasons why Title IX is an especially harmful intrusion into the religious liberty interests of church-related colleges and universities. The exemption now contained in the statute is so narrowly drawn that only those colleges legally "controlled" by a religious organization are entitled to consideration. Religiously oriented institutions of higher education having looser affiliations with a particular church should be fully entitled to this same protection, as should schools with other established educational missions having an explicit religious foundation.

Both the need for a broader religious exemption and the kind of exemption that might be considered are illustrated by the case history of a problem that arose in 1978 between Brigham Young University and the Justice Department.

After investigating an individual complaint, the Justice Department publicly announced its intention to bring suit against the university for violating the sex discrimination provisions of the Fair Housing Act. The university required single students in off-campus apartments to live in sex-segregated apartment buildings, a practice which on its face violated federal law. The Justice Department told the university it had no intention of forcing single students of the opposite sex to share bedrooms or apartments. However, the university's president was not comforted by this assurance, because he saw no legal distinction that would permit a landlord to discriminate on the basis of sex in assigning students to a particular apartment, but prohibited such discrimination in assigning students to a building or one of its wings. The university claimed exemption from the law on First Amendment religious liberty grounds.

Editorials in national newspapers and a vocal public outcry supported the university's position. Said the Los Angeles Times, "The threatened suit appears an abrasive, meddlesome intervention in a situation where the discrimination alleged is more

theoretical than real, and where the risk of governmental intrusion in the area of religious freedom is more real than theoretical."

The Justice Department ultimately entered into a settlement agreement with the university, which allowed sex-segregated housing by individual building for single students because of the substantial religious values the department came to recognize. Significantly, the formal agreement expressly applied also "to other educational institutions which, on the basis of religious or moral principle, provide for the sexual separation of their single students in housing."

Title IX, of course, does not recognize "religious or moral principle" as a basis for legitimate distinctions based on gender, unless the college is controlled by a church. The statute could, and should, recognize the same broader religious liberty interest as the Justice Department recognized, once it looked seriously at the impact of a law having purposes and characteristics very similar to Title IX.

If there were to be serious interest in this proposal on the part of Congress, AAPICU and other organizations representing the interests of church-related colleges (and perhaps church-related elementary and secondary schools) would be pleased to be of assistance in considering specific language.

C. Amend the Definition of "Recipient" to Exclude Colleges Receiving No Direct Federal Assistance and Whose Students Receive No "Campus-Based" Benefits.

In the Grove City case, the Supreme Court concluded as a matter of statutory interpretation that federal assistance to students triggers the application of Title IX, even when a college receives no direct federal aid. The statute itself prohibits sex discrimination "under any education program or activity receiving Federal financial assistance." 102/

102/ 20 U.S.C. § 1682 (emphasis added).

The Supreme Court had the difficult task of deciding key issues under Title IX in the face of ambiguous statutory language, sketchy legislative history, and conflicting judicial and administrative signals. The impact of the Court's holding that students receiving federal grants triggers Title IX coverage was moderated for schools like Grove City College by the Court's determination that statutory coverage must be limited to the school's financial aids program. The majority's resolution of the two issues of "recipient" and "program specificity" could be viewed as a fair result — something of a compromise — in the unique case of a private school which receives no other federal aid. If S. 2568 is enacted as proposed, however, the "compromise" will end. Hence the need to consider the unique problem of the college that has contact with federal funding only through student aid.

What makes the resolution of the student aid question so difficult is that aid to students is in a hybrid catagory. Direct grants to a school (even if channelled first through a state agency) clearly trigger coverage as federal assistance to the school. On the other hand, welfare and other general assistance benefits to individuals do not presently trigger coverage [103/] even when used so as to benefit an entity such as a school. Student aid lies somewhere in between these two typical types of federal aid. Students are obviously the primary intended beneficiaries of student aid. It is generally accepted that by educating more of its citizens, the country as a whole is benefitted. In addition, educated individuals are more likely to have higher incomes — possibly repaying with interest the nation's investment in student aid through higher tax revenues, and being less likely to be future welfare burdens. Students are not encouraged to achieve higher levels of education simply to keep the schools solvent. At the same time, of course, schools do benefit from aid to students. Moreover, student aid is earmarked to be used only in connection with education.

103/ See Section II.B., supra.

The earlier reference to problems relating to the First Amendment's Establishment Clause 104/ suggests two helpful perspectives on this problem. First, the Supreme Court has long distinguished between "direct" and "indirect" aid to religious schools in considering alleged violations of church/state separation. "Indirect" in this sense has usually meant that a specific benefit earmarked for educational purposes went to a student's family rather than to the school he or she attended. Benefits of this indirect type are the only ones to have withstood Establishment Clause challenges. These cases do make clear that the direct-indirect distinction is both meaningful and workable.

Second, for reasons explained previously, 105/ the "recipient" status of church-related colleges whose students receive federal assistance may itself be a violation of the Establishment Clause. When considering the applicable constitutional tests, one finds that a critical issue is whether the funds will be spent for a secular purpose. In the context of student aid, the answer to that question depends on who is spending the money. When a student receives a federal grant or loan, the student may spend the money for a variety of education-related expenses, from food and lodging to tuition. Costs other than tuition are frequently high enough in relation to grant amounts to consume all of the student's federal funds. Such costs may well be incurred off campus. It would not be appropriate in such a circumstance to evaluate the secular purpose or source of funds for that student's payment of tuition to a church-related college, because the constitutional issue is whether the school uses governmental funds for non-secular purposes. The entanglements of accounting and metaphysics in this situation seem a bit silly, because a moment's reflection about the problem makes it clear that the student is both the receiver and the expender of the federal money. In addition, of course, there is

---

104/ See Section II.E., supra.

105/ Id.

the risk that an Establishment Clause violation is actually involved in the notion that student aid makes a recipient of a church-related college. The obvious way to remove this risk is to clarify the law so that it regards the student as the final recipient.

Another helpful approach to the student aid question is found in the framework established by Congress under Title VI. The Supreme Court evidently ignored this guidance in its resolution of the student aid question in Grove City. Since Title IX's legislative history is virtually silent on the student aid question, congressional intent under Title VI as a directly analogous statute may be appropriately relied upon. 105a/

Congress made absolutely clear in the enactment of Title VI that "ultimate beneficiaries" of federal assistance were not covered by Title VI. Senator Humphrey stated that "Title VI will not authorize imposition of any requirements on the ultimate beneficiaries of . . . welfare payments," and "Title VI would not authorize the withholding of any of these direct payments on the ground that the recipient engages in racial discrimination in connection with his business or other activities." 106/ Attorney General Robert Kennedy explained this limitation in connection with the overall scheme of Title VI: "title VI is limited in application to instances of discrimination against the beneficiaries of federal assistance programs." 107/ This statutory scheme seems to have particular application in the case of student aid: the civil rights statutes are meant to insure that the intended beneficiaries are not discriminated against, but beneficiaries are free to choose to attend the school of their choice. 108/

105a/ See n.6, supra.

106/ 110 Cong. Rec. 6545 (1964). This understanding of Congress' intention is reflected in current regulations. See text accompanying nn. 25-27, supra.

107/ 110 Cong. Rec. 10076 (1964) (letter to Senator Cooper) (emphasis added).

108/ See Comment, Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof", 78 Mich. L. Rev. 608, 613-17 (1980).

Not only does the legislative history indicate that Congress did not intend an ultimate beneficiary to be subject to Title VI's requirements, but also it is clear that the primary beneficiary was not to trigger Title VI coverage for another person or entity with whom the beneficiary might have dealings (and who thus would "benefit" from the federal assistance). The original legislation would have broadly covered "direct or indirect financial assistance." 109/ After holding hearings which considered the scope of this coverage of "indirect" assistance, 110/ the "indirect" application of Title VI was removed and replaced with the narrower "program or activity receiving federal financial assistance." 111/ Senator Humphrey further clarified that "[i]t is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs." 112/ For the same reasons, it should not matter that a school benefits from a student beneficiary of federal aid.

Central to these limitations intended by the 88th Congress is an implicit concern regarding the unfairness of harming a student on federal aid in order to coerce the school. The beneficiary of the aid should be the one protected, to insure that he or she is not denied the benefits of the federal assistance as a result of discrimination. Closely related to this point, and another strong indicator that student aid should not trigger coverage of a private school, was Congress' strong concern that federal assistance only be cut off in the particular program or activity where discrimination was

---

109/ H.R. 7152, 88th Cong., 1st Sess., 109 Cong. Rec. 11252 (1963).

110/ See Civil Rights: Hearing on Miscellaneous Proposals Regarding the Civil Rights Of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 659 (1963).

111/ H.R. 7152, 88th Cong., 1st Sess. (Comm. Print, Oct. 2, 1963).

112/ 110 Cong. Rec. 6545 (1964).

found. 113/ Yet, if student aid is the only source of coverage, the only available sanction is to terminate aid to all students, even where discrimination is limited to a particular part of the school.

The Supreme Court in Grove City, while apparently disregarding the evidence of the approach intended by Congress as set forth above, stated that "[t]he drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage." 114/ As its support for this statement, the Court cited a floor statement of Senator McClellan. 115/ That the Court would cite this as support for its statement is at best disappointing. Senator McClellan's view of Title VI was that it was "clearly unconstitutional." 116/ Senator McClellan felt Title VI might "destroy the vast system and network of programs and activities by which the Federal Government is providing essential financial aid and assistance to State and local government." 117/ First, rather than support the proposition that Congress anticipated student aid would be covered, Senator McClellan's remarks indicate that Congress was not totally sure what would be covered. 118/ Second, in accordance with the Senator's concerns that all grants-in-aid programs would be covered under Title VI, he summarized all federal grants-in-aid programs existing at that time in order to show "what these Federal aid programs mean to the people of this Nation." 119/ It was this list the Supreme Court in Grove City cited to show an intention that student aid be covered. Finally, as further evidence that this list

---

113/ See Section II.C., supra.

114/ 104 S.Ct. at 1218.

115/ Id. at n.15.

116/ 110 Cong. Rec. 13378 (1964).

117/ Id.

118/ See id. at 13382.

119/ Id. at 13385, 13387.

is hardly evidence of congressional intent on the issue of student aid, Senator McClellan's list included several types of general assistance welfare benefits, 120/ which Congress clearly did not intend to be covered. 121/

The available legislative history under Title VI supports the view that student aid should not trigger Title IX regulations. This conclusion also corresponds to the sensible approach to Title VI coverage as originally intended by Congress. It is therefore proposed that S. 2568 be amended to remove from the definition of "recipients" those educational institutions which receive no direct federal aid and whose students receive no "campus-based" student aid. All other student aid programs are "campus-based," meaning that the educational institution involved receives the federal funds itself, has some discretion in making student awards, or is in some other way involved in more than a nominal and indirect way. This proposal might more clearly establish that the student aid is "indirect" if the Education Department were to establish local service centers at which students could make applications for federal assistance to be used at an institution that merely certifies such requirements as enrollment and satisfactory progress.

One of the advantages of this proposal is that it uses the "recipient" definition t[illegible]ow for the special and limited circumstance of independent colleges receiving no direct aid. Thus, no exception is made to whatever Congress chooses to do with the problem of program specificity — which was, after all, the issue from the Grove City case that led to the introduction of S. 2568.

120/ Id. at 13388-89.

121/ For example, Senator Kuchel stated that "[n]othing in Title VI would authorize cancellation of Federal checks for social security or veterans' pensions or agricultural price supports because the State in which recipients live discriminates in the administration of federally supported programs. Yet some who seek to mislead the public have said there is." Id. at 6563.

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Abilene Christian University	Texas	4518
Academy of the New Church	Pennsylvania	159
American Baptist Theological Sem	Tennessee	177
Anderson College	South Carolina	1048
Andrews University	Michigan	2851
Anna Maria College	Massachusetts	1655
Averett College	Virginia	916
Azusa Pacific University	California	2467
Baker University	Kansas	839
Baptist College at Charleston	South Carolina	2170
Baylor University	Texas	10473
Becker Junior College	Massachusetts	516
Belhaven College	Mississippi	938
Benjamin Franklin University	D.C.	408
Berea College	Kentucky	1532
Berry College	Georgia	1499
Bethany Nazarene College	Oklahoma	1400
Bethel College	Kansas	661
Biola University	California	3096
Birmingham-Southern College	Alabama	1553
Bridgewater College	Virginia	894
Brigham Young Univ. - Hawaii	Hawaii	1607
Brigham Young University	Utah	29695
Buena Vista College	Iowa	1403
CBN University	Virginia	350
California Baptist College	California	660
Calvin College	Michigan	3807
Campbell University	North Carolina	3052
Capitol Institute of Technology	Maryland	821
Carroll College	Wisconsin	1380
Catawba College	North Carolina	987
Central New England College	Massachusetts	306
Chowan College	North Carolina	1087
College of Insurance	New York	1622
College of the Southwest	New Mexico	204
Columbia Bible College	South Carolina	877
Concordia Teachers College	Nebraska	1062
Cumberland College	Kentucky	1747
Dallas Baptist College	Texas	1337
Divine Word College	Iowa	99
Dordt College	Iowa	1077
Dr. Martin Luther College	Minnesota	725
Dropsie University	Pennsylvania	42
Eastern Nazarene College	Massachusetts	841
Eckerd College	Florida	1051
Emory and Henry College	Virginia	769
Eureka College	Illinois	537

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Flagler College	Florida	981
Friends University	Kansas	813
Furman University	South Carolina	3105
Georgetown College	Kentucky	1211
Grace College of the Bible	Nebraska	312
Grand Canyon College	Arizona	1257
Greensboro College	North Carolina	585
Grove City College	Pennsylvania	2200
Hanover College	Indiana	994
Hardin-Simmons University	Texas	1948
Hebrew Union College	Ohio	145
Heidelberg College	Ohio	840
Hillsdale College	Michigan	1044
Houston Baptist University	Texas	2688
Howard Payne University	Texas	1123
Illinois Benedictine College	Illinois	2362
Indiana Institute of Technology	Indiana	557
International College	California	696
International Fine Arts College	Florida	267
Jamestown College	North Dakota	616
Johnson and Wales College	Rhode Island	4695
Judson College	Illinois	414
Kansas-Newman College	Kansas	759
King College	Tennessee	429
Lenoir-Rhyne College	North Carolina	1382
Liberty Baptist College	Virginia	3386
Limestone College	South Carolina	1536
Loma Linda University	California	5157
Louisburg College	North Carolina	717
Louisiana College	Louisiana	1049
Loyola College	Maryland	6182
Malone College	Ohio	872
Manhattan College	New York	4841
Maria Regina College	New York	508
McKendree College	Illinois	750
McPherson College	Kansas	496
Mercer University	Georgia	2950
Meredith College	North Carolina	1615
Mid-America Nazarene College	Kansas	1218
Midway College	Kentucky	349
Milwaukee School of Engineering	Wisconsin	2536
Mississippi College	Mississippi	2775
Missouri Valley College	Missouri	480
Mount Saint Mary's College	Maryland	1696
Mount Vernon Nazarene College	Ohio	1027
National College	South Dakota	3026
National University	California	6824

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Nichols College	Massachusetts	992
North Carolina Wesleyan College	North Carolina	932
Northrop University	California	1445
Northwest Nazarene College	Idaho	1221
Northwestern College	Iowa	891
Northwestern College	Wisconsin	269
Northwood Institute	Michigan	2119
Oakland City College	Indiana	562
Oakwood College	Alabama	1418
Ohio Northern University	Ohio	2625
Oklahoma Baptist University	Oklahoma	1416
Oklahoma Christian College	Oklahoma	1614
Oklahoma City University	Oklahoma	3158
Olivet Nazarene College	Illinois	1907
Oral Roberts University	Oklahoma	4024
Our Lady of the Lake University	Texas	1577
Pacific States University	California	800
Pacific Union College	California	1592
Palm Beach Atlantic College	Florida	656
Park College	Missouri	3179
Parks College	Colorado	892
Parks College of St Louis Univ.	Illinois	1029
Patten College	California	143
Peace College	North Carolina	454
Pepperdine University	California	6499
Point Loma Nazarene College	California	1870
Principia College	Illinois	788
Ricks College	Idaho	6539
Robert Morris College	Pennsylvania	5689
Rockford College	Illinois	1469
Roosevelt University	Illinois	6685
Rose-Hulman Institute of Tech.	Indiana	1322
Saint Augustine's College	North Carolina	1581
Saint Francis College	Pennsylvania	1565
Saint John's University	Minnesota	2028
Saint Joseph's College	Indiana	963
Saint Mary's College	Minnesota	1404
Saint Mary's College of Calif.	California	2956
Saint Mary's University	Texas	3311
Salve Regina - Newport College	Rhode Island	1961
Samford University	Alabama	4161
School of the Ozarks	Missouri	1293
Sierra Nevada College	Nevada	212
Simpson College	California	306
Southern Methodist University	Texas	9156
Southern Missionary College	Tennessee	1801
Southwestern Adventist College	Texas	712

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Southwestern College	Oklahoma	51
Sterling College	Kansas	394
Taylor University	Indiana	1460
Tiffin University	Ohio	510
Trevecca Nazarene College	Tennessee	972
Trinity Christian College	Illinois	440
Trinity College	Illinois	556
Truett-Mcconnell College	Georgia	852
Union College	Nebraska	1024
Union University	Tennessee	1374
University of Dallas	Texas	2684
University of Mary Hardin-Baylor	Texas	1170
University of Richmond	Virginia	4411
Valparaiso University	Indiana	4251
Villanova University	Pennsylvania	11716
Warren Wilson College	North Carolina	535
Wayland Baptist University	Texas	1469
Wentworth Institute of Tech.	Massachusetts	3737
Westminster College	Utah	1233
Westminster Theological Seminary	Pennsylvania	422
Wheaton College	Illinois	2490
Whitworth College	Washington	1802
William Jewell College	Missouri	1569
Wingate College	North Carolina	1481
York College of Pennsylvania	Pennsylvania	4364

BEST COPY AVAILABLE

TITLE IX PORTION OF
PROPOSED CIVIL RIGHTS LEGISLATION

I. Section 901 of Title IX is amended to read:

"No person in the United States shall, on the basis of sex, be ~~excluded~~ from participation ~~in~~, be denied ~~the~~ benefits ~~of~~, or be subjected to discrimination ~~under any education program or activity receiving~~ by any education recipient of Federal financial assistance, except that:" [the exceptions that follow are retained without change].

II. The following definition of "recipient" is added to Title IX as §901(c)(2):

(2) For the purpose of this Title, the term "recipient" means --

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

III. Section 902 of Title IX, is amended to read:

"Each Federal department and agency which is empowered to extend Federal financial assistance ~~to any~~ for education ~~program or activity~~, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to ~~such program or activity~~ recipients by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to

BEST COPY AVAILABLE

continue assistance ~~under such program or activity~~ to any recipient as to ~~whom~~ which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to ~~whom~~ which such a finding has been made, and shall be limited in its effect to the particular ~~program, or part thereof, in which~~ assistance which supports such noncompliance ~~has been~~ so found, or (2) by any other means authorized by law:

Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

BEST COPY AVAILABLE